No. 04-472

Supreme Court, U.S.
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In The
Supreme Court of the United States

H&R BLOCK, INC.; H&R BLOCK GROUP, INC.; H&R BLOCK SERVICES, INC.; H&R BLOCK TAX SERVICES, INC.; H&R BLOCK EASTERN TAX SERVICES, INC.; H&R BLOCK EASTERN ENTERPRISES, INC.; AND H&R BLOCK EASTERN SUPPORT SERVICES, LLC,

Petitioners,

v.

ERIN M. McNULTY AND BRIAN J. ERZAR, on behalf of themselves and all others similarly situated,

Respondents.

On Petition For A Writ Of Certiorari To The Superior Court Of Pennsylvania

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether this Court should decline to review an intermediate state appellate court's finding that, based on the particular facts and circumstances of the underlying lawsuit, a dispute was not arbitrable because no contract containing an arbitration clause existed between the parties.

2. Where the intermediate state appellate court already found that a dispute was not arbitrable because no contract containing an arbitration clause existed between the parties, whether this Court should decline to review the state court's dicta addressing whether an arbitration clause in an inapplicable contract would be unconscionable if the contract applied to the underlying lawsuit.

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COUNTER-STATEMENT OF THE CASE

Respondents Erin McNulty and Brian Erzar ("Respondents") commenced this class action lawsuit in the Lackawanna County (Pennsylvania) Court of Common Pleas, alleging, *inter alia*, that Petitioner H&R Block, Inc. and several of its affiliate companies (collectively "Block") deceptively causes its Pennsylvania tax return customers to incur unnecessary and excessive "electronic" tax return filing fees of approximately $35.00 per customer. Respondents assert claims under Pennsylvania law for breach of fiduciary duty, breach of contract, breach of the duty of good faith and fair dealing, unjust enrichment, and violations of Pennsylvania's Unfair Trade Practices and Consumer Protection Law, 73 P.S. § 201-1, *et seq*.

A. This Lawsuit Does Not Concern "Refund Anticipation Loans" Obtained From Household Bank

In addition to providing tax preparation and electronic filing services, Block also facilitates "Refund Anticipation Loans" ("RALs") between some of its tax customers and Household Bank ("Household"), an independent lender that is not a party to this lawsuit. RALs are high-interest loans collateralized by the customer's expected tax refund. Block's tax preparers do not begin facilitating RALs until *after* Block completes its tax preparation services and Block electronically files the customer's tax return.

This lawsuit does not challenge Block's or Household's RAL practices.[1] Rather, Respondents' legal claims focus entirely on Block's electronic tax filing practices, and the damages sought stem entirely from Block's exorbitant electronic tax filing fees.

B. RAL Loan Transactions Are Separate And Distinct From Block's Tax Filing Services

Block's customers contract with Block to provide tax preparation and electronic tax filing services. These services, and Block's charges for these services, are at issue in this lawsuit.

A sharp distinction exists between Block's tax preparation and electronic tax filing practices and any subsequent RAL loan transaction between the tax customer and Household. This distinction is evidenced by the fact that many Block customers who file their taxes electronically through Block do not even seek Household RALs. For example, in fiscal year 2002, only 5,151,000 of Block's 14,279,000 electronic filers sought RALs.

After Block completes its tax preparation and tax filing services, *some* of its customers attempt to obtain a Household RAL loan. Block refers these customers to Household, and the customer completes a Household loan application and agreement. Household and the customer then enter into a separate contract (the "Household RAL Agreement") covering the RAL loan transactions. Block is not a party to the Household RAL Agreement.

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[1] Such practices are the subject of nationwide litigation, which is entirely unrelated to this lawsuit. *See, e.g., Carnegie v. Household Int'l, Inc.*, 376 F.3d 656 (7th Cir. 2004).

The Household RAL Agreement confirms that Block is a tax preparer and tax filer, and that Block plays no role in the RAL loan transaction between Household and the customer:

> I understand that for various fees received, [Block] is acting only as my tax preparer (if applicable), my electronic filer, or as the purchaser of an interest in certain RALs issued by [Household] (if applicable) with respect to this RAL transaction. I further understand that [Block] is not acting in a fiduciary or agency capacity with respect to me in connection with this transaction and has no other duties to me beyond the preparation of my tax return (if applicable), the transmission of my tax return information to [Household], and the electronic filing of my tax return with the IRS.

Importantly, the Household RAL Agreement presents all contractual rights and obligations as arising between the customer and Household. For example, one provision states: "This Application and agreement is entered into between me and [Household] in Delaware." Another provision, entitled "PRIVACY STATEMENT," contains the following introductory statement:

> *Introduction – Our Commitment to You*
>
> Household Bank, f.s.b., a Household International company, is proud to be part of a financial services organization that has been providing superior product and services to its customers for more than 122 years. We greatly appreciate the trust that you and millions of other Household International customers have placed in us, and we will protect that trust by continuing to respect the privacy of all our

> applicants and customers even if our formal customer relationship ends.

Another provision, entitled "NO FIDUCIARY/AGENCY DUTY," reads:

> I understand that for various fees received, [Block] is acting only as my tax preparer (if applicable), my electronic filer, or as the purchaser of an interest in certain RALs issued by [Household] (if applicable) with respect to this RAL transaction. I further understand that [Block] is not acting in a fiduciary or agency capacity with respect to me in connection with this transaction and has no other duties to me beyond the preparation of my tax return (if applicable), the transmission of my tax return information to [Household], and the electronic filing of my tax return with the IRS.

The Household RAL Agreement contains an arbitration clause, the first paragraph of which provides in relevant part:

> By signing this RAL Application or the Loan Agreement, (collectively the "Documents"), I hereby agree that any claim, dispute or controversy, whether in contract, tort (intentional or otherwise), whether pre-existing, present or future, and including constitutional, statutory, common law, regulatory, and equitable claims with HB (as defined below) in any way relating to (a) the Documents or similar documents for prior years, (b) advertisements, promotions, or oral or written statements related to RALs, and/or (c) the relationships of the parties, including the validity, enforceability or scope of this Arbitration Provision or any part thereof (collectively the "Claim"), shall be resolved, upon the

> election of either me or HB, by binding arbitration pursuant to this Arbitration Provision and the applicable rules of either the American Arbitration Association ("AAA"), JAMS/Endispute ("JAMS") or the National Arbitration Forum ("NAF") in effect at the time the Claim is filed. . . .

Further down the arbitration clause, one finds a smorgasbord of one-sided provisions. These include a paragraph giving "HB" an uninhibited right to pursue non-arbitral remedies at its own discretion, a paragraph prohibiting customers from commencing or participating in collective litigation, and the following fee-shifting arrangement:

> At my request, HB will pay the remainder of the filing fee and any administrative or hearing fees charged by the arbitration administrator, up to $1,500.00 on any Claim asserted by me in the arbitration. If I should be required to pay any additional fees to the arbitration administrator, HB will consider a request by me to pay all or part of the additional fees; however, HB shall not be obligated to pay any additional fees unless the arbitrator grants me an award. If the arbitrator grants an award in my favor, HB will reimburse me for any fees paid or owed by me to the arbitration administrator up to the amount of the fees that would have been charged if the original claim had been for the amount of the actual award in my favor. If the arbitrator issues an award in HB's favor, I will not be required to reimburse HB for any fees HB has previously paid to the arbitration administrator or for which HB is responsible.

Lastly, a closing paragraph of the arbitration clause purports to redefine the term "HB" for the *sole* purpose of the arbitration clause. Throughout the entire body of the Household RAL Agreement, "HB" consistently refers to Household only. But, for purposes of the arbitration clause, the meaning of "HB" is temporarily expanded to include "Household Bank, f.s.b., and H&R Block, Inc., and each of their parents, wholly or majority-owned subsidiaries, affiliates, predecessors, successors, and the franchisees of any of them, and each of their officers, directors, and employees."

C. The Trial Court Opinion

After Respondents commenced this lawsuit in the Lackawanna County (Pennsylvania) Court of Common Pleas, Block filed preliminary objections alleging, *inter alia*, that Respondents' claims were subject to binding arbitration under the arbitration clause in the Household RAL Agreement. Pennsylvania Common Pleas Judge Trish Corbett issued an extensive opinion overruling Block's preliminary objections. *See* Petition at Appendix A. In rejecting arbitration, the trial court focused on whether a contract containing an arbitration clause existed between Block and Respondents. *See id.* at A17-A25. The trial court cogently observed that "[w]hile it may seem obvious, it is important to note that if parties did not contractually agree to arbitrate, they cannot be required to do so," *id.* at A21, and that "it is for the court to determine if an agreement to arbitrate exists," *id.* at A23. The trial court then held that the Household RAL Agreement did not exist between Block and Respondents and, therefore, arbitration was not warranted. *See id.* at A24-A26.

D. The Pennsylvania Superior Court Opinion

Block appealed Judge Corbett's finding that no contract requiring arbitration existed between the parties. A three-judge panel of the Pennsylvania Superior Court heard oral argument and conducted a "careful review of the parties' submissions, relevant case law, statutes, regulations, and the record," *McNulty v. H&R Block, Inc.*, 843 A.2d 1267, 1269 (Pa. Super.), *appeal denied*, 853 A.2d 362 (Pa. 2004). In February 2004, the Superior Court entered an opinion unanimously affirming the trial court. *See id.* at 1269-73.

At the outset of its analysis, the Superior Court cited this Court's decision in *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983), for the proposition that "[t]he [Federal Arbitration Act] represents a declaration of a liberal policy favoring arbitration, and so any doubts regarding the scope of arbitral issues should be resolved in favor of arbitration." *McNulty*, 843 A.2d at 1271. But the Superior Court also appreciated that "the existence of an arbitration clause and a liberal policy favoring arbitration does not require the rubber stamping of all disputes as subject to arbitration," *id.* at 1271, and that "the court's role is greater than simply determining whether a contract has been signed," *id.* at 1272.

The Superior Court then undertook a careful analysis of the Household RAL Agreement in the context of the underlying factual record. Based on this analysis, the Superior Court affirmed the trial court's finding that no contract requiring arbitration existed between Block and Respondents. The Superior Court squarely held that Block was not a party to the Household RAL Agreement and concluded that "[i]t simply makes no sense to provide

Block with independent rights to enforce the arbitration provision of a contract it is not a party to. . . ." *McNulty*, 843 A.2d at 1272; *accord id.* at 1270 ("Block is not an actual party to the loan"); *id.* at 1272 ("Block is not an actual party to the RAL. . . ."). The Superior Court also emphasized that the Household RAL Agreement had absolutely nothing to do with Block's electronic tax filing practices at issue in this lawsuit. *See id.* at 1271-73.

The Superior Court's finding that no contract containing an arbitration clause existed between Block and Respondents was based on a detailed analysis of the factual record. In particular, the Superior Court made/affirmed the following findings of fact: (a) the RAL "is a separate agreement (not with Block) from the actual filing of the tax return and there is no requirement that the [tax] client obtain an RAL," *McNulty*, 843 A.2d at 1269; (b) in order to obtain a RAL, the Block tax client must enter into "a separate contract with Household," *id.*; (c) the Household RAL Agreement "makes clear" that, other than originating the loan process, "Block has no other connection to the loan, specifically denying Block status as a fiduciary or agent," *id.*; *accord id.* at 1272 ("the RAL specifically denies Block's status as fiduciary or agent in terms of the RAL"); (d) Block "provides no money to the client, is not responsible for the repayment of the RAL, nor does it process the [RAL] loan," *id.* at 1270; (e) "the filing of a tax return does not obligate one to obtain a loan," *id.*; (f) "the administrative or processing charges incurred in filing a tax return will be incurred independent from any other transaction a customer may have with Household," *id.*; (g) "there is no indication at all in the record that Household in any way benefits from the e-filing fee or has any input as to the fee in any way," *id.*; (h) "a person is

fully able to obtain tax preparation services, including electronic filing, without ever filing for a RAL," *id.*; (i) "[t]here is no signature required from any Block representative for the contract to be consummated," *id.*; and (j) "[b]y all appearances, Block need not have actually prepared the tax forms in question," *id.* Furthermore, the Superior Court found additional support for its finding by observing that Respondent McNulty did not even enter into a Household RAL Agreement for some of the years in question:

> The argument made by Block ignores the reality that McNulty was charged an [electronic] filing fee not only for the year she applied for a RAL, but for the prior year as well. Block offers no argument, nor can we perceive one, which would sufficiently explain how a fee charged one year before a loan request, regarding a transaction completely unconnected to the loan request, can in any way, shape or form be intermeshed with the loan request.

McNulty, 843 A.2d at 1273.

Finally, the Superior Court, after confirming that no contract requiring arbitration existed between the parties, observed that the trial court's decision could be affirmed on the alternative ground that the arbitration clause in the Household RAL Agreement would be unconscionable if applied to this lawsuit. *See McNulty*, 843 A.2d at 1273-74. The Superior Court recognized that, under the Federal Arbitration Act ("FAA"), arbitration clauses may be invalidated "based on such traditional grounds as duress, fraud, illegality and unconscionability." *Id.* at 1273. The Superior Court then reasoned that, under Pennsylvania law, the arbitration clause in the Household RAL Agreement would

be unconscionable "as applied to the present factual scenario," *id.*, because Respondents would have to

> . . . spend[] $50.00 [in arbitration fees] for a return of something around $30.00. While there may be a select few who are so incensed by the notion of the e-filing fee they would spend significant time and $50.00 for the possibility of a $30.00 award, this is a situation where the costs of arbitration, minimal though they may seem, work to preclude the individual presentation of claims.

Id. at 1274. The Superior Court emphasized that "the unconscionability of this arbitration provision is only in reference to the present factual situation." *Id.* at 1274 n.9.

E. The Pennsylvania Supreme Court's Denial Of Block's Appeal

Block petitioned the Pennsylvania Supreme Court for review of the Superior Court's opinion. On July 1, 2004, the Pennsylvania Supreme Court denied Block's appeal. *See McNulty v. H&R Block, Inc.*, 853 A.2d 362 (Pa. 2004).

SUMMARY OF ARGUMENT

Having failed to convince the Pennsylvania Supreme Court to review this case, Block requests a writ of certiorari from this Court. Block's request should be denied. Block cannot present any justification for this Court's review of Judge Corbett's fact-specific determination, as affirmed by a unanimous panel of the Pennsylvania Superior Court. In the underlying proceedings, the state courts simply applied well-established legal principles to the underlying facts of this case. Block's disagreement

with the outcome of the state courts' analysis does not warrant this Court's review.

Respondents filed this lawsuit in order to challenge practices that have enabled Block to collect electronic filing fees of approximately $35 from Respondents and thousands of other Pennsylvania consumers. Respondents assert their claims as a class action because the class action device provides Respondents with the *only* rational method of seeking relief. *See Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 617 (1997) ("'The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights.'"). As recently observed by Judge Posner, "[t]he realistic alternative to a class action is . . . zero individual suits, as only a lunatic or a fanatic sues for $30." *Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004).

Block seeks to avoid Respondents' legal claims by relying on an arbitration clause in the Household RAL Agreement even though, as explained by Judge Corbett and the Pennsylvania Superior Court, the particular facts of this case establish that (a) Block has never been a party to the Household RAL Agreement containing the arbitration clause, (b) for some of the years in question, Respondent McNulty – like millions of other Block tax preparation customers – was not a party to Household RAL Agreement, and (c) the Household RAL Agreement has absolutely nothing to do with Block's electronic tax filing practices.

Block argues that only an arbitrator can decide the arbitrability of Respondents' claims. But Block's argument ignores *Equal Employment Opportunity Commission v.*

Waffle House, Inc., 534 U.S. 279 (2002), wherein this Court reiterated that arbitration is *never* warranted where one of the litigants is not a party to the contract containing the arbitration clause. Here, the Superior Court confirmed, based on a careful study of the factual record, that the Household RAL Agreement did not exist between Block and Respondents. Thus, under *Waffle House* and other decisions discussed at pages 13-19 *infra*, an arbitrator lacks authority to resolve any issue pertinent to this lawsuit. Block's dissatisfaction with the Superior Court's factual findings cannot justify a writ of certiorari.

Block next challenges the Superior Court's unconscionability discussion. However, even if this Court disturbed the Superior Court's observation that the arbitration clause in the Household RAL Agreement would be unconscionable under the specific facts of this case, arbitration still would be improper due to the Superior Court's previous holding that the Household RAL Agreement did not exist between Block and Respondents. Furthermore, the Superior Court's unconscionability discussion is consistent with this Court's precedent, including *Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79 (2000).

ARGUMENT

A. The Superior Court's Refusal To Compel Arbitration Because No Contract Containing An Arbitration Clause Existed Between The Parties Does Not Conflict With The Decisions Of This Court

The Superior Court, affirming the trial court, found that Block was not a party to the Household RAL Agreement and

concluded that "[i]t simply makes no sense to provide Block with independent rights to enforce the arbitration provision of a contract it is not a party to. . . ." *McNulty*, 843 A.2d at 1272; *accord id.* at 1270 ("Block is not an actual party to the loan"); *id.* at 1272 ("Block is not an actual party to the RAL. . . ."). The Superior Court also agreed with the trial court that the Household RAL Agreement had absolutely nothing to do with Block's electronic filing practices or any other subject matter of this lawsuit. *See id.* at 1271-73. As discussed at pages 7-10 *supra*, the Superior Court undertook a detailed analysis of the underlying factual record. After this careful review, the Superior Court held the trial court did not abuse its discretion, since Block was *never* a party to the Household RAL Agreement and, during some relevant years, *neither Block nor Respondent McNulty* were parties to the Household RAL Agreement.

Block cannot credibly contest these factual findings since, in lawsuits challenging its *RAL practices*, Block regularly seeks dismissal on the grounds that it is not a party to the same Household RAL Agreement at issue in this case. *See, e.g., Carnegie v. Household Int'l, Inc.*, 220 F.R.D. 542, 547 (N.D. Ill.) ("Block argues that Ms. Carnegie cannot sustain a claim against it for breach of contract, as it was not a party to any RAL contract."), *aff'd*, 376 F.3d 656 (7th Cir. 2004).

Nor can Block credibly argue that this Court's precedent allows arbitration clauses to bind non-parties such as itself. In *Equal Employment Opportunity Commission v. Waffle House, Inc.*, 534 U.S. 279 (2002), this Court was presented with an employment contract with an arbitration clause providing: "The parties agree that any dispute or claim concerning Applicant's employment with [Waffle

House, Inc.], or the terms, conditions or benefits of such employment, ***including whether such dispute or claim is arbitrable***, will be settled by binding arbitration." *Id.* at 282 n.1 (emphasis supplied). This Court held that the Waffle House arbitration clause had no impact on a lawsuit filed by the EEOC on behalf of a covered employee because the EEOC was not a party to the underlying contract, and "nothing in the [FAA] authorizes a court to compel arbitration of any issues, *or by any parties*, that are not already covered in the agreement." *Id.* at 289 (emphasis supplied). This Court explained:

> The FAA directs courts to place arbitration agreements on equal footing with other contracts, but it "does not require parties to arbitrate when they have not agreed to do so." Because the FAA is "at bottom a policy guaranteeing the enforcement of private contractual arrangements," we look first to whether the parties agreed to arbitrate a dispute, not to general policy goals, to determine the scope of the agreement. While ambiguities in the language of the agreement should be resolved in favor of arbitration, we do not override the clear intent of the parties, or reach a result inconsistent with the plain text of the contract, simply because the policy favoring arbitration is implicated. "Arbitration under the [FAA] is a matter of consent, not coercion." Here there is no ambiguity. No one asserts that the EEOC is a party to the contract, or that it agreed to arbitrate its claims. *It goes without saying that a contract cannot bind a nonparty.* Accordingly, the proarbitration policy goals of the FAA do not require the agency to relinquish its statutory authority if it has not agreed to do so.

Id. at 293-94 (internal citations omitted) (emphasis supplied). Since the EEOC was not a party to the underlying employment contract, the arbitration clause therein had no effect, and the clause's requirement that the arbitrator decide arbitrability was ineffective. *See id.*

Likewise, in *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543 (1964), this Court addressed "whether a corporate employer must arbitrate with a union under a collective bargaining agreement between the union and another corporation which has merged with the employer." *Id.* at 544. Writing for a unanimous Court, Justice Harlan showed no hesitation in fulfilling the *judicial* function of deciding whether the successor corporation was a party to the collective bargaining agreement:

> The threshold question in this controversy is who shall decide whether the arbitration provisions of the collective bargaining agreement survived the Wiley-Interscience merger, so as to be operative against Wiley. Both parties urge that this question is for the courts. Past cases leave no doubt that this is correct. . . . The duty to arbitrate being of contractual origin, a compulsory submission to arbitration cannot precede judicial determination that the collective bargaining agreement does in fact create such a duty. Thus, just as an employer has no obligation to arbitrate issues which it has not agreed to arbitrate, so *a fortiori*, it cannot be compelled to arbitrate if an arbitration clause does not bind it at all.

Id. at 546-47 (internal footnote and citations omitted).

Waffle House and *John Wiley & Sons* confirm the common sense notion that arbitrators lack any authority to resolve disputes unless the parties to the dispute

actually entered into a contract containing an arbitration provision.[2] As Judge Corbett correctly observed: "While it may seem obvious, it is important to note that if parties did not contractually agree to arbitrate, they cannot be required to do so." Block Petition at A21; *see also Volt Information Sciences, Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989) ("the FAA does not require parties to arbitrate when they have not agreed to do so"); *AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643, 649 (1986) ("arbitrators derive their authority to resolve disputes only because the parties have agreed in advance to submit such grievances to arbitration"); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985) ("the first task of a court asked to compel arbitration of a dispute is to determine whether the parties agreed to arbitrate that dispute"); *Gateway Coal Co. v. United Mine*

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[2] Block makes much of the fact that the arbitration clause in the Household RAL Agreement empowered the arbitrator to decide arbitrability, discussing this Court's decisions in *First Options of Chicago v. Kaplan*, 514 U.S. 938 (1995), and *Howsam v. Dean Reynolds, Inc.*, 537 U.S. 79 (2002). *See* Petition at 11-14. But Block's observations are of no consequence to the threshold issue of whether the Household RAL Agreement even existed between Block and Respondents. In *First Options* and *Howsam*, the existence and applicability of the underlying contract was undisputed, and, therefore, it was proper for this Court to interpret the arbitration clause contained therein. Here, however, we never reach the "who decides arbitrability" question because, as observed by Judge Corbett and the Superior Court, the Household RAL Agreement containing the arbitration clause does not exist between Block and Respondents. This approach is entirely consistent with *Waffle House*, wherein this Court refused to require arbitration by a non-party to the contract even though the pertinent arbitration clause required that any dispute or claim, "including whether such dispute or claim is arbitrable, will be settled by binding arbitration." *Waffle House*, 534 U.S. at 282 n.1.

Workers of America, 414 U.S. 368, 374 (1974) ("The law compels a party to submit a grievance to arbitration only if he has contracted to do so."); *Will-Drill Resources, Inc. v. Samson Resources Co.*, 352 F.3d 211, 219 (5th Cir. 2003) (refusing to compel non-party to arbitrate dispute because "where a party attacks the very existence of an agreement, as opposed to its continued validity or enforcement, the courts must first resolve that dispute"); *Alexander v. Anthony Int'l, L.P.*, 341 F.3d 256, 264 (3d Cir. 2003) ("a court, before directing the parties to proceed with [arbitration], must still ascertain whether the parties entered a valid agreement to arbitrate"); *Opals on Ice Lingerie v. Bodylines Inc.*, 320 F.3d 362, 368-70 (2d Cir. 2003) (arbitrator lacked any authority where one litigant was not proper party to contract containing arbitration clause); *Snowden v. Checkpoint Check Cashing*, 290 F.3d 631, 637 (4th Cir.) ("if a party never assented to the overall contract containing the arbitration provision, then the party never assented to the arbitration provision," and, therefore, "the district court is required to decide the assent issue even though the issue goes to the making of the entire agreement"), *cert. denied*, 537 U.S. 1087 (2002); *Fleetwood Enterprises, Inc. v. Gaskamp*, 280 F.3d 1069, (5th Cir. 2002) ("federal policy favoring arbitration does not apply to the determination of whether there is a valid agreement to arbitrate between the parties"); *Sphere Drake Ins. Ltd. v. All American Ins. Co.*, 256 F.3d 587, 591 (7th Cir. 2001) (arbitrators may not decide whether litigant was proper party to contract containing arbitration clause since arbitrators lack "authority to determine their own authority because there is a non-circular alternative (the judiciary) and because the parties do control the existence and limits of an arbitrator's power. No contract, no power."), *cert. denied*, 538 U.S. 961 (2003); *Sandvik AB v. Advent*

Int'l Corp., 220 F.3d 99, 107 (3d Cir. 2000) (determining whether underlying contract exists "is a necessary prerequisite to the court's fulfilling its role of determining whether the dispute is one for an arbitrator to decide under the terms of the arbitration agreement"); *McCarthy v. Azure*, 22 F.3d 351, 355 (1st Cir. 1994) (federal policy favoring arbitration "does not extend to situations in which the identity of the parties who have agreed to arbitrate is unclear"); *Chastain v. Robinson-Humphrey Co., Inc.*, 957 F.2d 851, 854 (11th Cir. 1992) (court must decide whether party entered into contract containing arbitration clause because "[i]n such a case, that party is challenging the very existence of any agreement, *including the existence of an agreement to arbitrate*"); *Three Valleys Mun. Water Dist. v. E.F. Hutton & Co., Inc.*, 925 F.2d 1136, 1140 (9th Cir. 1991) ("because an 'arbitrator's jurisdiction is rooted in the agreement of the parties,' . . . a party who contests the making of a contract containing an arbitration provision cannot be compelled to arbitrate the threshold issue of the *existence* of an agreement to arbitrate"); *Painwebber, Inc. v. Hartmann*, 921 F.2d 507, 511 (3d Cir. 1990) ("as a matter of contract, no party can be forced to arbitrate unless that party has entered into an agreement to do so"); *Camping Const. Co. v. Dist. Council of Iron Workers*, 915 F.2d 1333, 1340 (9th Cir. 1990) ("The court must determine whether a contract ever existed; unless that issue is decided in favor of the party seeking arbitration, there is no basis for submitting any question to an arbitrator."), *cert. denied*, 500 U.S. 905 (1991); *I.S. Joseph Co., Inc. v. Michigan Sugar Co.*, 803 F.2d 396, 399-400 (8th Cir. 1986) ("any power that the arbitrator has to resolve the dispute must find its source in a real agreement between the parties," and, therefore, "the enforceability of

an arbitration clause is a question for the court when one party denies the existence of a contract with the other").

Here, as in the above cases, the trial court and Superior Court refused to send any issues to arbitration based on the fact-specific determination that Block and Petitioners did not enter into a contract containing an arbitration clause. This finding is consistent with *Waffle House*, *John Wiley & Sons*, and a significant body of additional caselaw, and Block's dissatisfaction with the outcome of the state courts' analysis of the record does not justify a writ of certiorari.

B. The Superior Court's Unconscionability Discussion Does Not Present An Issue For This Court To Review

As previously discussed, the Superior Court, after affirming the trial court's finding that no contract containing an arbitration existed between Block and Petitioners, discussed whether the arbitration clause contained in the Household RAL Agreement was unconscionable under the specific facts of this case. *McNulty*, 843 A.2d at 1273-74. Block asks this Court to review this discussion.

The Superior Court's unconscionability discussion is not properly before this Court. As discussed *supra*, the Superior Court upheld the trial court based on its independent review of the record and determination that no contract containing an arbitration clause existed between Block and Respondents. Given this factual finding, the Superior Court's unconscionability discussion was unnecessary to its affirmance of the trial court, and, therefore, reversal of the Superior Court's unconscionability discussion

will not impact the outcome of this appeal. In sum, this Court's review of the Superior Court's unconscionability discussion is entirely unnecessary.

C. In Any Event, The Superior Court's Unconscionability Analysis Does Not Conflict With The Decisions Of This Court

In any event, the Superior Court's discussion of unconscionability is consistent with this Court's precedents based on the specific facts of this case. Block contends that the Superior Court erred by even addressing unconscionability. *See* Petition at 15-19. According to Block, an arbitrator must decide unconscionability due to language in the arbitration clause that purportedly empowers him/her to resolve "any claim, dispute or controversy . . . in any way relating to [the loan documents] . . . and/or (c) the relationships of the parties, including the validity, enforceability or scope of this Arbitration Provision. . . ." This argument does not justify a writ of certiorari for two independent reasons.

First, Block incorrectly presupposes that it was even a party to the Household RAL Agreement. But as previously discussed, the Superior Court exhaustively reviewed the record and determined that Block was not a contracting party. This finding, standing alone, would prohibit an arbitrator from addressing any issue, including unconscionability. "The duty to arbitrate being of contractual origin, a compulsory submission to arbitration cannot precede judicial determination that the collective bargaining agreement does in fact create such a duty." *John Wiley & Sons*, 376 U.S. at 547; *see also Waffle House*, 534 U.S. at

293-94 ("It goes without saying that a contract cannot bind a nonparty."); *Volt Information Sciences*, 489 U.S. at 478 ("the FAA does not require parties to arbitrate when they have not agreed to do so"); *AT&T Technologies*, 475 U.S. at 649 ("arbitrators derive their authority to resolve disputes only because the parties have agreed in advance to submit such grievances to arbitration"); *Mitsubishi Motors Corp.*, 473 U.S. at 626 ("the first task of a court asked to compel arbitration of a dispute is to determine whether the parties agreed to arbitrate that dispute"); *Gateway Coal Co.*, 414 U.S. at 374 ("The law compels a party to submit a grievance to arbitration only if he has contracted to do so.").

Second, this Court's precedent does not require the Superior Court to refer unconscionability determinations to an arbitrator. In *Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79 (2000), this Court was presented with an arbitration clause that read in part:

> All disputes, claims, or controversies arising from or relating to this Contract or the relationships which result from this Contract, ***or the validity of this arbitration clause or the entire contract***, shall be resolved by binding arbitration by one arbitrator selected by Assignee with consent of Buyer(s).

Id. at 83 n.1 (emphasis supplied). Notwithstanding the above language, this Court did not hesitate to address whether the arbitration clause "is unenforceable because it says nothing about the costs of arbitration, and thus fails to provide her protection from potentially substantial costs of pursuing her federal statutory claims in the arbitral

forum. *Id.* at 89. This Court has never approved – in *Randolph* or any other case – the circular reasoning that an arbitration provision can divest the judiciary of its fundamental role of addressing whether the provision is itself unenforceable due to unconscionability or any "other grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. On the contrary, this Court has instructed judges to "remain attuned to well-supported claims that the agreement to arbitrate resulted from the sort of fraud or overwhelming economic power that would provide grounds 'for the revocation of any contract.'" *Mitsubishi Motors Corp.*, 473 U.S. at 627; *see also Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 687 (1996) ("generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening [the FAA]"); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 33 (1991) ("'courts should remain attuned to well-supported claims that the agreement resulted from the sort of fraud or overwhelming economic power that would provide grounds for the revocation of any contract.'"); *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987) (explaining that state law applies to arbitration clauses covered by the FAA "*if* that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally"). In sum, Block fails to explain how the Superior Court violated this Court's precedent when, as in *Randolph*, it addressed whether the pertinent arbitration clause was unconscionable.

Block's final argument that the Superior Court incorrectly found the Household RAL Agreement's arbitration clause to be unconscionable also is unavailing. *See* Petition

at 19-23. According to Block, the Superior Court "effectively created a *per se* rule that an arbitration agreement becomes unenforceable whenever the value of the claim at issue is so small that the court thinks a class action is the only way to get it adjudicated." *Id.* at 23. This is pure hyperbole. The Superior Court took pains to emphasize that, in finding the Household RAL Agreement's arbitration clause unconscionable, its analysis was specific to "the present factual scenario," *McNulty*, 843 A.2d at 1273, and that its finding "is only in reference to the present factual situation," *id.* at 1274 n.9. The Superior Court's analysis, based on and limited to the facts before it, is entirely consistent with this Court's instruction in *Randolph* that "the existence of large arbitration costs could preclude a litigant . . . from effectively vindicating her federal statutory rights in the arbitral forum," *Randolph*, 531 U.S. at 90, and that where "a party seeks to invalidate an arbitration agreement on the ground arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs," *id.* at 92. Here, the Superior Court analyzed the factual record and determined that the record adequately demonstrated unconscionability. This determination is consistent with *Randolph*, and Block's certiorari argument amounts to nothing more than a disagreement with the outcome of the Superior Court's analysis.

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CONCLUSION

The writ of certiorari should be denied.

Respectfully submitted,

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